No. 12966

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ESTHER WESTFALL,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE DAL M. LEMMON, *Judge*

BRIEF OF APPELLEE

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INDEX

CASES CITED

STATUTES

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BRIEF OF APPELLEE

JURISDICTION

This action was brought by the Appellee pursuant to the Federal Tort Claims Act (Section 1346, Title 28, U.S.C., and Chapter 171 of Title 28, U.S.C.). The jurisdiction of this Court to review the decision of the district court is set out in Title 28, U.S.C., Section 1291.

STATEMENT OF THE CASE

Appellee commenced this action on the 21st day of April, 1950, and seeks to recover for injuries sustained while a passenger on a bus operated by the United States Army (Tr. 12).

On February 20, 1946, at approximately eight o'clock p. m. Appellee was a passenger on a certain United States Army Bus belonging to the Appellant, and being used at the time to transport Appellee and others as passengers therein from Seattle to Fort Lewis, Washington, for the purpose of providing recreation by way of entertainment for members of the United States Military Forces stationed at Fort Lewis, pursuant to request therefor by agents of the Appellant, duly authorized and acting within the scope of their authority. The said bus was being driven by a soldier of the United States Army, pursuant to instructions from his superior officers, and he was acting within the scope of his authority and in the course of his employment as an employee of Appellant (Tr. 34, 62, 63, 65, 67, 69). At a point near the intersection of South Tacoma Way and South Thirty-eighth Street in the City of Tacoma, Washington, while proceeding in a southerly direction, at the time mentioned, the said soldier drove the said bus negligently and at an excessive and negligent rate

of speed and negligently applied the brakes on the said bus and negligently forced it violently and suddenly to stop, and Appellee was thrown suddenly and with great force from her seat on said bus to the floor (Tr. 35, 63, 65, 67, 70).

As a direct and proximate result of the negligence of the Appellant, through its agent as aforesaid, the Appellee suffered severe sprain of the lower back and left ankle, bruises, contusions and severe nervous shock. These injuries resulted in continuous and severe pain and suffering to this Appellee, necessitated frequent medical treatment for a period of approximately one year, and intermittent treatment thereafter. They have further occasioned a marked and permanent weakening of the Appellee's lower back and left ankle ligaments and muscles. All of which have and will continue to interfere with and reduce Appellee's capacity for the pursuit of her work and earning ability (Tr. 35-45, 68, 70-76, 84-90). Appellee has necessarily sustained special damages for expenditures for medical treatment and medicines in the total sum exceeding Two Hundred and Fifty Dollars ($250.00), all of which amounts are reasonable (Tr. 44, 76, 77, 86, 91).

The negligent acts and omissions of the Appellant, as aforesaid, were contrary to the laws of the

State of Washington and the ordinance of the City of Tacoma, and the same were done under circumstances where the Appellant, if a private person, would have been liable to Appellee for injuries and damages proximately resulting therefrom (Tr. 3-8).

The transportation of Appellee from Seattle to Fort Lewis, as provided by Appellant to Appellee, was in consideration of and as a condition to the providing entertainment for said armed forces by Appellee (Tr. 34, 35, 62, 65).

At the conclusion of the evidence and after due consideration the Court awarded the Appellee judgment in the sum of Seven thousand five hundred dollars ($7,500.00), as general damages, and the sum of Two hundred fifty dollars ($250.00), as special damages, being a total sum of Seven thousand seven hundred fifty dollars ($7,750.00), plus her costs, against Appellant. (Tr. 26).

RESTATEMENT OF THE QUESTIONS RAISED

Appellee considers the questions raised by Appellant's Specifications of Error to be as follows:

1. In an action brought under the Federal Tort Claims Act, (Section 1346, Title 28, U.S.C.A., and Chapter 171 of Title 28, U.S.C.A.), within the time specified in the Act, is the statute of limitations of the

state within which the cause arose applicable?

Answer by the Court in the negative.

2. In an action brought under the Federal Tort Claims Act, supra, if the statute of limitations of the state within which the cause arose is applicable, must the statute of limitations be pleaded as a defense?

Answered by the Court in the affirmative.

3. In an action brought under the Federal Tort Claims Act, supra, must laches be pleaded as an affirmative defense?

Answered by the Court in the affirmative.

4. Is Appellee guilty of laches?

Answered by the Court in the negative.

5. Is the Appellee herein a "guest or licensee" within the meaning of Section 6360-121 of Remington's Revised Statutes of the State of Washington, and thereby barred from recovery against Appellant?

Answered by the Court in the negative.

6. Is the evidence sufficient to sustain the Court's finding that Appellee is entitled to $250.00 as special damages?

Answered by the Court in the affirmative.

7. Is the evidence sufficient to sustain the

Court's finding that Appellee is entitled to $7,500.00 as general damages?

Answered by the Court in the affirmative.

8. Is the evidence sufficient to sustain the Court's finding that Appellant's driver was guilty of negligence?

Answered by the Court in the affirmative.

9. Was the evidence sufficient to sustain the Court's finding that Appellee was not negligent?

Answered by the Court in the affirmative.

10. Was Appellant accorded the right to be heard?

Answered by the Court in the affirmative.

11. Is the evidence sufficient to sustain the Court's Findings of Fact?

Answered by the Court in the affirmative.

12. With expert testimony available as to Appellee's physical condition, did the Court abuse its discretion in excluding a report by a witness, as to the general educational qualifications of Appellee, who was admittedly not a medical expert?

Answered by the Court in the negative.

ARGUMENT IN SUPPORT OF JUDGMENT

Appellant in its Brief sets out ten Specifications of Error as the basis for this appeal. Appellee's argument in support of the judgment appealed from is herewith submitted by way of answer to Appellant's Specifications of Error, in the order in which said Specifications are set forth in Appellant's Brief.

ARGUMENT IN ANSWER TO SPECIFICATION OF ERROR No. 1

SUMMARY

If the statute of limitations of the State of Washington were applicable to such actions as Appellee's herein, under the laws of said State, and under Federal Rules of Civil Procedure, such statutes must be pleaded as an affirmative defense. The action is one which does not exist at common law and has its origin in a statute which conditions the right of action to its commencement within a limited period of time, the time specified is a part of the substantive right and not a procedural requirement. The statute of limitations of the State of Washington is not applicable to Appellee's cause of action.

ARGUMENT

1. If the statute of limitations of the State of Washington were applicable to Appellee's action here-

in, or any statute of limitations, same were not pleaded timely or affirmatively by Appellant, and cannot, upon conclusion of the presentation of evidence in the case or upon appeal, be asserted as a defense barring recovery by Appellee herein. Remington's Revised Statutes of the State of Washington, Section 115, relating to limitation of actions, provides:

> "Actions can only be commenced within the periods herein prescribed, after the cause of action shall have occurred, except when in special cases a different limitation is prescribed by statute, *but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer.*" (Italics supplied).

In *State ex rel. Teeter v. Court*, 110 Wash. 255, the Supreme Court of the State of Washington held that the defense of the statute of limitations is waived if not timely interposed.

In *Dibble v. Bellingham Bay Lumber Company*, 163 U.S. 63, it was held that Federal Courts will follow the state court in construction and application of statutes of limitation.

The defense of the statute of limitations, regardless of the rules of civil procedure of the state, is required by the Federal Rules of Civil Procedure, Rule 8(c), Title 28, U.S.C.A., to be set up affirmatively.

In the case of *Weber v. United States*, D.C. N.V., 1948, 8 F.R.D. 161, it was held that the defense of

the statute of limitations in an action under the former Section 931, et seq., of the Federal Tort Claims Act, Title 28, U.S.C.A., brought in Federal District Court in New York, had to be set up affirmatively in answer pursuant to Federal Rules of Civil Procedure, Rule 8(c), supra, and could not be raised by motion to dismiss complaint pursuant to New York Rules of Civil Practice, since the federal law prevailed over the state rule.

Appellant did not plead the defense of the statute of limitations by answer, demurrer, or otherwise, affirmatively or timely and is thereby precluded from subsequently asserting same as a bar to recovery by the Appellee.

2. The statute of limitations of the State of Washington is not applicable to Appellee's cause of action herein.

Section 2401, Chapter 161, U.S.C.A., Title 28, relating to the time for commencing action against the United States, which was enacted June 25, 1948, c. 646, 62 Stat. 971, and amended April 25, 1949, c. 92, Sec. 1, 63 Stat. 62, provides as follows:

> "A tort claim against the United States shall be forever barred unless action is begun within two years after such claims occurred or within one year after the date of enactment of this amendatory sentence, whichever is later . . ."

The section quoted clearly supersedes any provision of the statutes of the State of Washington relating to commencement of such actions where, as in this case, the United States is a defendant. *Jefferson v. U. S.*, D.C. Md., 1948, 77 Fed. Suppl. 706; *Sweet v. U. S.* D.C. Calif., 1947, 71 Fed. Suppl. 863; *Kohn v. U. S.*, Calif., 1948, 75 Fed. Suppl. 689; *State of Maryland v. U. S.*, 195 Fed. (2d) 869.

In the *Kohn case, supra,* the court held that an action instituted under former Section 931, Title 28, U.S.C.A., and the California one year statute of limitations could not be pleaded as a defense.

In the *State of Maryland v. United States, supra,* the Circuit Court of Appeals for the Fourth Circuit found that under Maryland law the limitation of twelve months prescribed in the state's wrongful death statute was a condition precedent to the right to maintain an action thereunder, but held that under the Federal Tort Claims Act, the law of the state must be considered for purpose of defining the actionable wrong for which liability shall exist on the part of the United States, but the Act itself fixes the limitation of time within which action shall be instituted to enforce the liability.

This action was brought within the time specified in the Act. The 1949 Amendment, in effect

at the time this action was commenced, was intended to revive such otherwise expired tort claims against the United States occurring on or after January 1, 1945. 1949 U.S. Code Cong. Service, p. 603.

ARGUMENT IN ANSWER TO SPECIFICATION OF ERROR No. 2

SUMMARY

Laches is an affirmative defense and must be pleaded. If it is not, as here, it is not available. Likewise, where a right of action is conferred by statute for a specified period of time, the doctrine of laches is not available as a defense to action commenced within that period of time. Appellee has not in any way been guilty of laches, and her actions have in no way prejudiced the position of the Appellant.

ARGUMENT

1. Appellant's plea of laches is not timely.

Under the Statutes of the State of Washington, Remington's Revised Statutes, Sec. 263, laches is an affirmative defense and required to be pleaded by answer or demurrer. The statute provides:

> "If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the

> complaint does not state facts sufficient to constitute a cause of action . . ."

Also under Federal Rules of Civil Procedure laches is an affirmative defense, and must be pleaded affirmatively. The Federal Rules of Civil Procedure, Sec. 8 (c), Title 28, U.S.C.A., provides:

> "In pleading to a preceding pleading, a party shall set forth affirmatively . . . laches . . . statute of limitations . . ."

In *Thierfield v. Postman's Fifth Avenue Corporation*, D.C. N.Y., 1941, 37 F. Supp. 958, it was held that the defense of estoppel or laches must be affirmatively pleaded. See, also, *Bergeron v. Monsour*, 152 F. (2d) 27.

Appellant herein did not plead or raise the question of laches as a defense, either by answer or demurrer, or in any manner until conclusion of the presentation of evidence. To seek to interpose it as a bar to Appellee's recovery at such time, or upon appeal is too late. Appellant seeks to draw its support for the defense of laches from the evidence, and the rule is particularly applicable where laches is not apparent from the face of the complaint. See *LaVicchia v. First National Bank of Tampa*, 112 F. (2d) 145.

2. Appellee's right of action is conferred by statute for a specified period of time, and this action was commenced within such period of time.

Appellee commenced her action on April 20, 1950. The right to commence such action was extended to April 25, 1950, by Act of Congress, amending Section 2401, Chap. 161, U.S.C.A., Title 28, as heretofore set out. This revived Appellee's right of action for a period of twelve months, and it hardly can be said that she was guilty of laches in acting within that period.

Appellant contends that Appellee is guilty of laches because her action was not commenced within the period of the statute of limitations of the State of Washington applicable to such action. Certainly this cannot be true where there is an express reviver of such action, as in this case.

The case of *Westfall Larson & Company v. Allman-Hubble Tugboat Company*, 73 F. (2d) 200, cited by Appellant in its Brief at p. 16, is not in point. There recovery was sought in Admiralty for a non-maritime tort, action on which was not governed, as in the present case, by specific Federal statutory provision as to the time within which such an action might be commenced. The Admiralty court, "by analogy", permitted itself to be governed by the state statute of limitations covering actions of the nature disclosed by the libel. With respect to this case, attention is also invited to the consideration given by

the court to the fact that appellants therein made certain misleading representations to appellees and conceded that they could have brought their libel against appellees within the period prescribed by the state statute of limitations for actions of that nature, and to the conclusion of the court that it had no jurisdiction as to appellant's demand for reimbursement for sums paid out by it in connection with actions originated in the state court.

Numerous Washington cases, including those cited by Appellant, discuss the doctrine of laches. None were found which applied the doctrine, *particularly within the period of the statute of limitations*, and certainly not in a case where, as here, there was involved a statutory revival of a right of action for a specified period of time. The decisions do uniformly indicate that to constitute a valid defense laches must be pleaded affirmatively, and must in fact amount to estoppel. Illustrative of the Washington decisions; in *State v. Plummer*, 130 Wash. 135, the court, headnote No. 2, says, with reference to laches:

> " . . . Mere lapse of time, short of the statute of limitations, . . . does not amount to laches, precluding recovery, where the county was not *induced* to alter its position by the delay." (Italics supplied).

The court further stated in the body of its opinion that:

> "To constitute laches not only must there have been delay in the assertion of the claim, but some change of condition must have occurred which would make it inequitable to enforce the claim . . ."

The tenor of the Washington and Federal decisions is that, in addition to the lapse of any time permitted by statutes of limitation, there must be elements of estoppel, amounting to an inducement by the party seeking recovery to the other to change or alter his position, or leading to some change of condition which would make it inequitable to permit recovery.

In enacting the 1949 Amendment, supra, reviving actions such as Appellee's herein, Congress must have considered and waived possible disadvantages resulting from lapse of time and changing conditions.

3. Appellee herein has not in any way been guilty of laches and her actions have in no way prejudiced the position of Appellant.

After the injuries herein complained of, Appellee promptly advised Appellant, through its agents of the accident and of the resulting injuries to her. She has continued since the time of the accident to apprise Appellant, through its agents, of the seriousness of

her injuries and the resulting damage and loss to her, and sought to effect some settlement with appropriate agents of Appellant with regard thereto.

Appellee pressed her claim against the Appellant both orally and in writing, from the time it became apparent that she was seriously injured until it became apparent, in April, 1950, that she not only would be allowed nothing on her claim but that she could not even secure any determination of it, favorable or otherwise, before April 25, 1950, after which time she would again be barred from seeking redress in the courts. (Tr. 137).

The actions of the various agents of the Appellant, as reflected by the undisputed evidence in this case, taken with regard to the matter, throughout the period of time since the accident, clearly establish that they had adequate notice of Appellee's claim, that she was asserting it, and that a determination thereof prior to April 25, 1950, was of vital importance to her, since after that date she would have no right to initiate action before the Courts. This is clearly substantiated by the testimony of Appellant's witnesses as to their actions taken from time to time, and particularly by the testimony of the alleged driver of the vehicle, Mr. Yingling, that he had on numerous occasions during the past four years been contacted

by government representatives concerning the matter. (Tr. 119).

Appellant contends Appellant's (Br. p. 19) that had the action been brought sooner, Appellant would undoubtedly have had more adequate records and had the benefit of fresher memories. There is nothing by way of evidence to substantiate this contention, nor is there evidence of any kind which indicates that the actions of Appellee in any way induced a change in or prejudiced Appellant's position or conditions. It does appear from the testimony throughout the case that Appellant's agents were remiss in failing to keep proper records and in failing and neglecting to accord the accident subject hereof and Appellee's claim based thereon prompt and diligent attention. (Tr. 126, 122).

ANSWER TO ARGUMENT ON SPECIFICATION OF ERROR No. 3

SUMMARY

Appellee was not a "guest or licensee" of Appellant at the time of the accident subject to this action, and therefore, did not come within the terms of the "guest statute" of the State of Washington, Remington's Revised Statutes, Section 6360-121, prohibiting a recovery for personal injuries sustained. Since

Appellee was not a "guest or licensee" within the meaning of said "guest statute", her legal status at the time is immaterial, and she is entitled to recover from Appellant for the injuries sustained by her as a result of the negligence of Appellant's agent.

ARGUMENT

1. Appellee was not a "guest or licensee" within the meaning of the Washington "guest statute", supra.

Counsel for Appellant's entire reasoning with reference to the applicability of the Washington "guest statute", supra, and his treatment of the authorities cited in Appellant's Brief appear to be based upon their erroneous assumption that the evidence established that Appellee made the trip in question solely for her own or the group's pleasure, as a chaperon for her children, and to participate in a "party" or "social gathering" where refreshments were served (Appellant's Br. 21, 23). Counsel does not substantiate these conclusions by any reference to testimony or evidence introduced. In fact none of these conclusions were established or even seriously suggested by any of the witnesses as being the occasion for the trip or the motive or reason of the Appellant or its agents, either in securing the services of Appellee and her troupe or in providing the transportation

which took them to Fort Lewis and thus enabled them to render services to Appellant by way of providing entertainment for the soldiers stationed there.

Appellee, at the time the accident occurred, was a passenger on an army bus en route to Fort Lewis, Washington, with a U.S.O. troupe, for the purpose of providing entertainment for the soldiers stationed there. Appellee was director and a member of the U.S.O. troupe. The entertainment was provided at the request of agents of Appellant, and the soldier driving Appellant's vehicle at the time of the accident had been directed to transport Appellee and her troupe from Seattle to Fort Lewis for the purpose indicated (Tr. 34, 62, 103).

The United States performs a duty to its armed forces when it affords recreation. Recreation is a part of the soldier's duty and within the scope of employment, *Murphey v. United States*, 179 F. (2d) 743.

Appellee herein comes within the rule that where the operator or owner of the automobile is compensated in a substantial and material sense as distinguished from a social benefit the occupant is not a "guest or licensee" within the meaning of the Washington "guest statute", supra. In the case of *Scholz*,

et al. v. Lever, et al., 7 Wash. (2d) 76, the Supreme Court of the State of Washington held:

> "Rem. Rev. Stat., Vol. 7A Sec. 6360-121, . . . does not apply if there is payment for transportation, regardless of the existence of a previous contract, and such payment need not necessarily be made in money, it being sufficient if the presence of the occupant directly compensates the operator or owner in a substantial and material or business sense . . ."

In the body of the opinion in the Scholz case, supra, the court states:

> " . . . the meaning of the words invited guest or licensee can best be ascertained by considering them in connection with the phrase which immediately follows in the statute, that is, 'without payment for such transportation'. The qualifying phrase limits the scope of invited guest or licensee by indicating plainly that gratuitous carriage only is intended . . ."
>
> "Such is the construction which the courts in other jurisdictions have generally given to host and guest statutes substantially similar to the Washington . . ."

The court in the Scholz case cites a number of California, Oregon, Connecticut, Michigan and Iowa cases and refers to the case of *Syverson v. Berg*, 194 Wash. 86, and the case of *Fuller v. Tucker*, 4 Washington (2d) 426, as follows:

> ". . . the court held that the host and guest statute precluded recovery by the person transported under the circumstances there presented, but

> the requirements necessary to constitute payment for transportation such as to avoid the bar of the statute were specifically delineated. Such requirements are (1) actual or potential benefit in a material or business sense resulting or to result to the owner or occupant, and (2) that the transportation be motivated by the expectation of such benefit."

The rule as laid down by the court in the Scholz case has been consistently adhered to in this state, and is clearly applicable in the instant case. Subsequent Washington decisions which substantiate this view are *Engel v. Interstate Transit Co.*, 9 Wash. (2d) 590, *Pence v. Berry*, 13 Wash. (2d) 564, and *Finn v. Drtina*, 30 Wash. (2d) 814.

The Finn case, cited in Appellant's brief, page 24, with reference to joint adventurers, cites the rule of the Scholz and Pence cases, supra, with approval.

2. Since Appellee was not a guest or licensee "within the meaning of the Washington guest statute' her legal status at the time is immaterial insofar as the applicability of said statute is concerned, and she is not thereby barred from recovery herein.

In the Pence case, supra, the court held:

> "The automobile guest statute, Rem. Rev. Stat. Vol. 7A, Section 6360-121, does not bar recovery against the owner or operator of an automobile concerned in an accident by anyone other than an occupant who is an invited guest or licensee,

> without payment for transportation, hence, if an occupant of an automobile is not a guest or licensee of the owner or operator thereof at the time of the accident in which the occupant is injured, the exact nature of the legal status at the time is immaterial".

The decisions of the United States Supreme Court in the *Feres*, *Jefferson* and *Griggs cases* rendered December 4, 1950, being Nos. 9, 29 and 31 of the October term, and cited in Appellant's Brief on page 27, are clearly distinguishable from the present case and the authorities sustaining the position of the Appellee hereon on the bases of the facts involved. The plaintiffs therein were military personnel involved. The holding of the court in those cases was based upon their finding that military personnel comprised a special and unique group, for which no comparable or parallel liability previously existed, and belief that no new one was intended to be created. In addition, provision had long since been made by Congress for such personnel through the respective goverment agencies in which they served.

ARGUMENT IN ANSWER TO SPECIFICATION OF ERROR No. 4

SUMMARY

The evidence is sufficient to sustain the Court's finding that Appellee is entitled to special damages in the sum of $250.00.

1. The evidence established conclusively that the services of Dr. A. H. Seering to Appellee for injuries resulting from the accident subject hereof were billed for and of the reasonable value of $114.25, that no insurance company paid for these services, that Appellee paid for these services under a contractual agreement between her and the Medical Security Clinic, by pre-payment for medical services at the rate of $3.00 a month from 1943 to 1948 (Tr. 44, 76, 77).

The testimony indicates that the Medical Security Clinic to whom Appellee made payment for services render by Dr. A. H. Seering, possibly has a right of subrogation in the amount charged for such services. (Tr. 76, 77). If true, this would not preclude Appellee from recovery therefor.

Appellant in its Brief, page 31, cites the case of *United States v. Aetna Casualty Company*, 338 U. S. 366, to the effect that if a subrogee has paid the entire loss suffered by the insured, it is the only real party in interest and must sue in its own name. This

case is considered applicable to the instant case by Counsel for Appellant on the grounds that *all of the services of Dr. Seering* were paid by the subrogee, the Medical Security Clinic. (Appellant's Brief 31). Counsel for Appellant overlooks the fact that the case cited states that a subrogee is the only real party in interest and must sue in its own name, "*If the subrogee has paid the entire loss suffered by the insured . . .*" There is no such evidence in this case of the Medical Security Clinic having "paid the entire loss" of Appellee. To require that recovery of the $114.25 item of damage be in the name of a possible subrogee would amount to a severance of Appellee's cause, and subject Appellant to numerous actions.

In the State of Washington it is well established that where a subrogee's claim represents a part of an injured person's damage only, the suit must be in the injured person's name, or, if the injured person is hostile, he must be made a party defendant.

In the case of *Wood & Iverson, Inc. v. Northwest Lumber Company*, 138 Wash. 203, the Supreme Court of the State of Washington held:

> "An action for the loss of camp equipment caused by a forest fire negligently set out by the defendant is not effected by the fact that plaintiff had recovered insurance on the account

of the fire loss, and given a written subrogation agreement to the insurance company . . ."

In the body of the opinion in the Northwest Lumber Company case, at page 536, supra, the court states:

" . . . but respondent contends that this item, to the extent of $5,600.00 received by the appellant as insurance in the camp equipment, should be disallowed, because the appellant by a written subrogation agreement transferred its rights to the insurance campanies and they not being parties here cannot be bound by any judgment here entered and may still sue respondent on their written assignments. The written subrogation agreement, if made, adds nothing to the case, as in equity the insurer, upon paying the loss, is always subrogated to the rights of the insured and, as we see it, the question is no longer an open one, having been determined against respodents' theory by this court in *Alaska Steamship Co. v. Sperry Flour Co.*, 94 Wash. 227, which case has been followed in *Criez v. Sunset Motor Co.*, 123 Wash., 604, and *Schueitzer v. Weyerhaeuser Timber Co.*, 128 Wash. 186."

In the instant case Appellee is the real party in interest and may properly sue for all damages sustained.

2. The only and uncontroverted testimony as to the services of Drs. Lindahl and Sprecher establishes that Appellee went to them for advice or treatment. Further, that said doctors did examine and prescribe a course of treatment for Appellee. That their charges

therefor were $20.00 and $15.00 respectively, and that such charges were reasonable (Tr. 87, 90, 92, 96).

3. Appellee's testimony, substantiated by that of other witnesses, and none of which was controverted, established that she suffered frequently from her injuries sustained in the accident subject hereof, necessitating home treatments, medication and use of such drugs as aspirin, salves, rubbing alcohol, and other medicines that her expenditures therefor amounted to $150.00 (Tr. 42, 44, 45, 51, 68, 70, 71).

The uncontroverted evidence as to Appellee's special damages is more than sufficient to sustain the Court's award therefor in the sum of $250.00.

ANSWER TO ARGUMENT ON SPECIFICATION OF ERROR No. 5

SUMMARY

The Court found that as a direct and proximate result of the negligence of Appellant, through its agents, Appellee suffered injuries and damages as follows: Severe sprain of the lower back and left ankle, bruises, contusions and severe nervous shock; that these injuries resulted in continuous and severe pain and suffering to Appellee, necessitated frequent medical treatment for a period of approximately one year, and intermittent treatment thereafter: that

said injuries occasioned a marked and permanent weakening of Appellee's lower back and left ankle ligaments and muscles: that Appellee's injuries and resulting condition have and will continue to interfere with and reduce Appellee's capacity for the pursuit of her work and in earning a living; that as a consequence, Appellee has sustained general damages in the sum of $7500.00 (Tr. 21). The Courts findings are amply sustained by the evidence and more than justify the award made for general damages.

ARGUMENT

The evidence established conclusively that Appellee sustained a severe sprain of her back and left ankle (Tr. 35, 71, 73, 74, 89, 90). The testimony by those with actual knowledge of Appellee's condition established the fact that this condition continued in an aggravated and painful state, and still continues, occasioning Appellee much pain and suffering, that the inconvenience to her was pronounced and will continue to be so.

The testimony by expert medical witnesses, established with more than reasonable certainty that Appellee's injuries are permanent in nature (Tr. 89, 90). Evidence of the weakened, tender and strained condition of the ligaments and muscles affected by the severe sprain to Appellee's leg and back was found

by all medical examiners, and latest by Drs. McConville and Sprecher, almost five years after the date of the accident (Tr. 89-92, 132).

Dr. McConville, Appellant's expert witness, acknowledge from his own examination of Appellee, a possible continuing disability of 5% of total. (Tr. 132). Drs. Sprecher, Lindahl and Seering all concluded and testified that there was residual disability and that Appellee should restrict her activities. Dr. Sprecher further testified that surgery might help, but that in any event, Appellee could not be made whole in that her strength in leg and back are decreased and use thereby limited (Tr. 90, 91).

Uncontroverted testimony establishes that Appellee has been forced to delegate all of her usual household work and duties to others (Tr. 71). The evidence establishes that the overall average of Appellee's earnings since the injuries sustained by her have decreased as a result of such injuries at least $50.00 per month, despite the fact that with her family entirely dependent on her she found it necessary much of the time to undertake to work as she had prior to sustaining the injuries (Tr. 39, 40, 42, 44); that Appellee was finally forced to abandon employment which required regular attendance or being much on her feet, and to develop a means of

earning income which would enable her to arrange her own work schedule and avoid work or movement which would aggravate her condition (Tr. 40).

It appears obvious from the evidence that Appellee's loss of earnings due to impairment of earning capacity during the period since her injuries were sustained to date of judgment by trial Court, alone had included a loss of more than $50.00 per month for more than 30 months or in excess of $1600.00.

The evidence established that Appellee's life expectancy was 26 years at the time this case was tried (Tr. 75, 76): that her earning capacity has been reduced by a minimum of $50.00 per month and that it will be necessary to continue to restrict her activities. It is obvious that Appellee's loss will, in fact far exceed the total amount awarded by the Court as general damages.

As to Appellee's right to recover and the measure of damages the Court's attention is invited to the opinion of the Supreme Court of the State of Washington, in the case of *Dyal v. Fire Company's Adjustment Bureau*, 23 Wash. (2d) 515, wherein the court held that the measure of damages for personal injuries in such a sum, insofar as it is susceptible of estimate in money, as will compensate the injured person for all losses sustained as the natural and

proximate consequences of the wrongful act or omission of the defendant and which are established with reasonable certainty, and includes compensation for pain and suffering, loss of time, medical attention and support during the period of disability, and for such permanent injury and continuing disability as the injured person may have sustained.

As to the Court's discretion as to the amount of damages, attention is invited to the case of *The City of Panama*, 101 U.S. 453, which arose in the State of Washington, and wherein the court held that in an action for injuries there can be no fixed measure of compensation for pain and anguish of body and mind nor for permanent injuries to health and constitution, but the result must be left to the good sense and deliberate judgment of the tribunal entrusted with the duty of making determination.

The evidence in the instant case amply sustains the Court's award to Appellee of $7500.00 by way of general damages.

ANSWER TO ARGUMENT ON SPECIFICATIONS OF ERROR NOS. 6 AND 7

SUMMARY

The conclusions drawn and reasoning indulged by Counsel for Appellant in its Brief with reference

to the questions concerning negligence and contributory negligence are specious, but with no substantiation in the facts as established herein. The evidence established and is sufficient to sustain the Court's findings that Appellant's driver was negligent and that Appellee was no contributorily negligent.

ARGUMENT

Testimony of numerous witnesses, uncontradicted except by Appellant's alleged driver of the vehicle involved establishes that the driver approached the scene of the accident at the intersection of South 38th Street and South Tacoma Way in the City of Tacoma, Washington, driving in a violently reckless manner and at an excessive rate of speed, despite protests of such conduct having been made by Appellee, and upon the traffic light at said intersection changing from green to red, violently slammed the brakes on said vehicle, negligently bringing it to a sudden and unusual stop, thereby throwing Appellee from her seat to the floor of the bus and injuring her (Tr. 35, 36, 63, 65, 70, 141, 143, 162, 163).

The great preponderance of the testimony, again, contradicted only by Appellant's alleged driver of the vehicle involved, established that the vehicle involved in the accident subject hereof, contrary to the impression Counsel for Appellant sought to leave by intro-

ducing in evidence photographs of a new bus which admittedly was not of the vehicle in question, which was an old bus, with no protective railing in front of the seat occupied by Appellee (Tr. 56, 57, 58, 159). Testimony by Appellant's alleged driver of the vehicle involved in the accident subject hereof, Mr. Yingling, tending to contradict the uniform version of essential details of the incident and the negligent acts of the driver, as set forth, supra, becomes irrelevant and of no force, as does the testimony of Appellant's other witnesses concerning maintenance and condition of the vehicles at Fort Lewis, when testimony by other witnesses developed the fact that he, Mr. Yingling, was not the driver of the vehicle on which Appellee and the U.S.O. troup were riding when the negligent acts of the driver thereof occasioned the accident resulting in the injuries to Appellee. The testimony of these other witnesses establish fairly conclusively that Mr. Yingling was driving an army vehicle and transporting this same U.S.O. troup from Seattle to Fort Lewis several weeks before the accident in which Appellee was injured, i.e., on February 20, 1946, and that when at a point south of the City of Tacoma, and between that City and Fort Lewis, also on United States Highway No. 99, an incident occurred wherein another vehicle pulled from a side road onto the highway in front of Mr. Yingling ne-

cessitating a sudden stop which threw a member of the troupe, Mrs. Bruck, from her seat, nearly to the floor of the bus. Further, that Mr. Yingling was not the driver of the vehicle at the time and place of the accident subject of this action, was not present, and in fact had no knowledge whatever of it (Tr. 157, 158, 159, 160, 161, 162, 163, 164, 165).

There is no direct testimony of any acts of negligence on the part of the Appellee. To support its contention of contributory negligence, Counsel for Appellant submits only that Appellee, weighing an alleged 256 pounds would have been the last passenger to have been thrown from her seat if she had been seated in a normal position and not guilty of contributory negligence. The conclusion and arguments relied on by Counsel for Appellant are not supported by the facts established by the testimony of all witnesses who were present at the time of the accident in question. Appellee was seated in a normal position, facing toward the front of the bus with her feet on the floor (Tr. 35, 142, 143, 138, 139). There was no guard rail in front of the seat occupied by Appellee (Tr. 56, 57, 58, 159). Occupants of other seats were not thrown from their seats when the accident occurred since the backs of seats in front of them provided a guard. There was sufficient evidence to sustain the Court's finding that Appellant's

driver was negligent and that Appellee was not negligent.

ANSWER TO ARGUMENT ON SPECIFICATIONS OF ERROR NOS. 8, 9, AND 10

SUMMARY

The trial of this cause was completed on January 9th, 1951, and the Court's findings of fact were signed and lodged on February 2nd, 1951. The parties hereto were afforded a fair trial and ample opportunity to be heard. Counsel argued the facts and the law of the case, both orally and in writing. Appellee proved her case by a preponderance of the evidence, and the Court's findings were amply sustained thereby. With expert testimony available as to Appellee's physical condition, the Court properly excluded written report as to Appellee's general educational qualifications by one who admittedly was not a medical expert. There was no showing of abuse of the Court's discretion.

1. The decision of the Court upon the facts was not made until the findings of fact were signed and filed on February 2nd, 1951. As the record herein reflects, Counsel did argue the case, both during and upon conclusion of presentation (Tr. 166, 167, 168, 169, 170). Pursuant to arguments of Counsel the Court agreed with Counsel to permit, and pur-

suant to this directed, that Counsel prepare and file memoranda. Counsel, in the interval between the trial and February 2nd, did prepare and file briefs setting forth authorities and their respective arguments as to the facts and law. If Counsel for Appellant desired to more fully argue the facts they might have done so in the briefs submitted, or, if they entertained any misgivings as to whether it would have been permissible for them to do so, they should have at least requested permission, and, if they desired to further orally argue the facts, they could and should have moved the Court for leave to that end. If there were argument germane to the issues herein which were not presented to the Court by Counsel upon conclusion of presentation of evidence it could only have been due to the fact that Counsel was not then cognizant of them or was not prepared to present them, and not due to any action on the part of the Court in preventing them from being made. The fairness of the Court in assuring Counsel every opportunity to be heard is best evidence by the fact that the suggestion that additional time be allowed Counsel in which to prepare briefs originated with the Court. The authorities cited by Counsel for Appellant in its brief are submitted on the assumption that a reasonable opportunity to be heard was not afforded, and since this assumption is clearly

refuted by the record and the fact herein, the cases cited are not applicable, however they might otherwise be distinguishable.

2. Previous references herein to the evidence and to the record clearly reflect that the Appellee established her case by a preponderance of the evidence, and that the evidence is sufficient to sustain the trial Court's findings of fact.

3. Counsel for Appellant offered testimony by Mr. Harold R. Barton as to Appellee's physical condition. This testimony reflected only the most casual and limited opportunity on the part of this witness to observe Appellee's physical condition, and this a number of years after the accident. The witness was in no way qualified as an expert medical witness, or as having in fact examined the Appellee. Under the obvious pretext of seeking to confirm and strengthen Mr. Barton's testimony as to Appellee's physical condition by something in writing, Counsel sought to impugn Appellee's general educational qualifications as a teacher by introducing a written report allegedly made by the witness in 1949 and pertaining to such qualifications. The Court properly exercised its discretion in refusing to admit the questioned document. There is no showing that the Court abused its discretion herein.

CONCLUSION

Appellee has established herein that the question raised by Appellant's Specifications of Error should be answered as follows:

1. In this action, instituted by Appellee against Appellant under the provisions of the Federal Tort Claims Act, within the time specified in said Act, the statute of limitations of the State of Washington, Sections 155 and 159, Remington's Revised Statutes, is not applicable.

2. In this action, if the statute of limitation of the State of Washington, supra, were applicable, it still must be pleaded as an affirmative defense, and not having done so, Appellant cannot assert said statute as a defense to recovery by Appellee herein upon conclusion of the trial of the case to the trial Court, or on appeal.

3. Appellee's action was commenced within the period of time prescribed by the Federal Tort Claims Act, as amended, supra, which created the right of action, and her actions did not in any way prejudice the position of Appellant, therefore Appellee is not guilty of laches.

4. Laches, in an appropriate case, is an affirmative defense, and must be pleaded as such. Where,

as here, it is not, it cannot be asserted as a bar to recovery upon conclusion of the trial of a case, or on appeal.

5. The United States performs a duty to its armed forces when it affords recreation. Where, as here, in performing such duty it provides transportation to Appellee, and through negligence of its agent while said agent is acting within the scope of his authority, she is injured, said Appellee is not a guest or licensee within the meaning of Section 6360-121, Remington's Revised Statutes of the State of Washington, and said Appellee is not thereby barred from recovery against Appellant herein.

6. The evidence is sufficient to sustain the Court's finding that Appellee is entitled to $250.00 special damages.

7. The evidence is sufficient to sustain the Court's finding that Appellee is entitled to $7500.00 general damages.

8. The evidence is sufficient to sustain the Court's finding that Appellant's driver was negligent.

9. The evidence is sufficient to sustain the Court's finding that Appellee was not negligent.

10. Appellant herein was accorded a fair trial and the right to be heard.

11. The evidence is sufficient to sustain the Court's findings of fact.

12. There is no showing of an abuse of its discretion by the Court. . .

Appellee respectfully submits that the judgment of the Court herein should be affirmed.

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Attorney for Appellee